

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1702 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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ARVINDKUMAR MATHURADAS

RUPARELIYA

Versus

SHRINATHJI ENTERPRISE  
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Appearance:

MR SURESH M SHAH for Petitioners

MR CL SONI with MR SB VAKIL for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 5  
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CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 22/06/1999

#### ORAL JUDGEMENT

This revision application has been preferred against the order dated 10-11-1998 of the learned Assistant Judge, Junagadh dismissing the Civil Misc. Appeal No.105/98 and confirming the order of the Civil Judge (JD), Una passed below exh. 5 whereby the application exh. 5 for ad-interim relief was rejected.

2. The plaintiff filed the suit for the relief that the defendants, their family members or persons or the agents may not put up door or window of any kind in the wall of the southern side of their Shrinathji apartment or may not make holes or hollows for lavatory on that side or may not put up the balcony on that side and to that extent the permanent stay order was also requested. On the said allegations they moved an application for ad-interim injunction restraining the respondents from raising any construction and ad-interim order in the same nature as prayed for in the plaint. It is alleged that the petitioners - plaintiffs are residing in the society known as Anand Vatika at Una. The houses belong to the petitioners are constructed on subplot of final plot No. 67 (east) and no. 67 (west) of the Una T.P. Scheme No. 2. While the defendants - respondents are the owners of Sub-Plot No. 28 Final Plot No. 67 and at present they are raising construction of complex namely Shrinathji Apartments on the land of subplot No.28 of Final Plot No.67. The said subplot has been purchased by the respondents from one Haji Mohmadbhai of Porbandar by a registered sale deed dated 22-1-1997. The original owner of the said subplot had submitted the plan for construction on the said subplot to the Municipality and has obtained necessary permission to raise construction by permit No. 168 dated 6-5-1996. The respondents are required to keep the open 4.65 sq. mtr. in front and 3 sq. mtr. on back side and 3-00 sq.mtr. on both the sides. But the defendants have not kept any margin on the southern side of the construction and they have started to raise construction without leaving open land on the southern side. The plaintiffs also applied to Una Municipality and Una Municipality issued the notice to the respondents. But the Una Municipality has not taken any action against them. It is also alleged that if the defendants will put doors, windows and terrace on the southern side of the disputed construction, they will throw dirty water, dust and all other dirty articles and they will pollute the whole atmosphere and they may dig drainage on the southern side and the plaintiffs requested for granting injunction preventing the respondents from putting windows, doors and terrace on the southern side and that should not use any space for lavatory.

3. The application for ad-interim injunction has been rejected by the Civil Judge (JD), Una. Thereafter, the petitioners filed Civil Misc. Appeal No. 105/98 before the District Court, Junagadh. The learned Appellate Judge has considered the material on record. The learned Appellate Judge has also considered the map

mark 4/1 submitted by the vendor before the Una Municipality. The defendants also sought permission to raise construction upto the end of the southern boarder and after leaving this boarder there is internal way of the society which is 6.10 mtr. wide. The Appellate Judge also considered the report of the Commissioner mark 9/1. From the Commissioner's Report it appears that there is an internal road of 6.10 mtr. on of the southern side of the construction. The permission was also produced which is at mark 4/1. The letter written by the Chief Officer of Una Municipality is at mark 50/1 which shows that one Suryakant Chimanbhai Gandhi one of the defendants, on behalf of the Shreenathji Enterprize had applied to the Municipality with a revised plan to obtain the permission of the subplot no. 20 and that had been sanctioned by the Municipality. The copy of the revised plan was also produced at mark 50/2. The Appellate Judge also found that no documentary evidence has been produced by the petitioners to show that the respondents were required to keep some open space on the southern side of the construction on the subplot no. 28 and then the defendants should raise construction as per the Rules of the T.P. Scheme No. 2. The plaintiffs have not produced any Rule or Byelaws to show that the defendants were required to keep some open space and the Court below came to the conclusion that the respondents defendants have not raised any illegal construction against any Rules or Byelaws of Una Municipality. The respondents have also produced the photographs of the site which show that there is a road between two plots and it also appears from the assertions made by the petitioners that there is some road on the southern side on which the petitioners apprehend that the respondents will put windows, doors or terrace on the southern side of the disputed construction. The Appellate Judge also considered that there was apprehension in the mind of the petitioners that the people who are going to reside in the said apartments may throw some dirty water and articles as the respondents had kept windows, doors and terrace on the southern side which will create nuisance on the whole way. There is no observation of the Appellate Judge that any encroachment has been made by the defendants - respondents on the public road. If there is public way, every person has right to use it by passing and the persons living nearby can also use by opening the windows, ventilators etc. No person can prevent them from enjoying the space of the road which does not amount to nuisance.

4. The Lower Appellate Court has also found that there is no prima facie case in favour of the petitioners

and hence he dismissed the appeal and confirmed the order of the Civil Judge (J.D. ) passed below the application exh. 5.

5. Heard learned counsel for the parties. Learned counsel for the petitioners contended that under the Rules and Byelaws of the Una Municipality the respondents are required to leave certain land open and that has not been left and in contravention of the Byelaws the construction has been made which is illegal and they should be restrained from raising any further construction. The contention of the learned counsel for the petitioners that the disputed construction is illegal and against the byelaws of Una Municipality, has been raised for the first time in this Court and there is no material on record to show that the respondents are required to leave certain portion of the land to be kept open. This contention was also considered by the Lower Appellate Court and it has been observed that no material or evidence has been produced to that effect. Only it was stated that when they made a complaint against the respondents to Una Municipality, Una Municipality issued show cause notice against the respondents. But later on, Municipal authority has not taken any action against them. From the evidence on record, it appears that the Municipal authority has sanctioned permission to raise the construction on the land. In case the Municipal authority has not taken any action against the respondents for raising illegal construction it was for the petitioners to approach the higher authority. But this Court cannot interfere on the ground that the higher authority has not taken any action against the respondents. It appears that the construction has already been completed with the sanction of the Una Municipality, the road has been provided between two subplots and that has not been encroached upon by the respondents.

6. I have considered the submissions made on behalf of the parties thoroughly and I am unable to find out any good reason for interference in the orders passed by the Court below. Accordingly, this Revision Application is dismissed. Rule is discharged, with no order as to costs.

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/JVSatwara/